

**DEPARTMENT OF STATE REVENUE
SUPPLEMENTAL LETTER OF FINDINGS:
02-0577P through 02-0596P
Indiana Withholding Tax
For Tax Year 2001**

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ISSUE

I. Tax Administration--Penalty

Authority: IC 6-8.1-10-6; 45 IAC 15-11-2.

Taxpayers protest the imposition of penalties associated with their failure to timely file with the Department Form WH-3 and state copies of Form W-2.

STATEMENT OF FACTS

The initial protest represented a consolidated appeal of proposed audit assessments. The issue: Taxpayers had filed Form WH-3 ("Annual Withholding Tax Reconciliation Return") and state copies of Form W-2 ("Wage and Tax Statement") late. For the 2001 tax year, in order to be considered "timely filed," taxpayers must have submitted Form WH-3 and state copies of Form W-2 (collectively, "the Information Returns") to the Department no later than February 28, 2002. The Information Returns submitted were postmarked March 14, 2002.

Pursuant to IC 6-8.1-10-6(b), the Department assessed penalties on taxpayers' failure to timely file their Information Returns. Taxpayers requested abatement of these penalties. The Department declined to do so. (*See Letter of Findings 02-0577P.LOF through 02-0596P.LOF.*) Taxpayers, pursuant to IC 6-8.1-5-1(f) and 45 IAC 15-5-5, then asked the Department to reconsider its original findings. The results of which now follow.

DISCUSSION

I. Tax Administration—Penalty

Taxpayers offered several rationales in support of their rehearing request. "We provide...new, additional, and sufficient information and reasons to warrant a rehearing in th[is] penalty appeals case...and to warrant the abatement of penalties that have been assessed... ." Specifically, taxpayers contend that (1) the Department's findings contain both errors of omission and errors of commission, (2) new and relevant information exists, and (3) imposition of penalties

represents an inequitable resolution of the issue and results in “undue hardship” to taxpayers’ “marginally profitable” businesses. However, regardless of form or guise, the substance of taxpayer’s arguments can be summarized as follows:

The IDR [Department] Letter of Findings implies that the taxpayers were willfully negligent in filing the Form WH-3 fourteen days late. This implication arises because if the taxpayers’ late filing were not due to willful neglect, and if IDR Appeals had properly applied Indiana Code Section 6-8.1-10-2.1(d), the appeal would have properly resulted in a waiving of the penalty for late filing of the Forms WH-3 as is provided by the Indiana Statute.

Law and Discussion

The liabilities at issue represent penalty assessments based on taxpayers’ failure to timely file information returns. The language of IC 6-8.1-10-6 (b), which authorizes penalties for the late filing of “information returns,” states:

If a person fails to file an information return required by the department, a penalty of ten dollars (\$10) for each failure to file a timely return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, is imposed.

The language cited by taxpayers, IC 6-8.1-10-2.1(d), imposes penalty liability on the “failure to file a return for any of the listed taxes.” IC 6-8.1-10-2.1(a)(1). The penalty portion of the statute, IC 6-8.1-10-2.1(d), reads:

If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person’s return, timely remit tax held in trust, or pay the deficiency determined by the department *was due to reasonable cause and not due to willful neglect*, the department shall waive the penalty. (emphasis added.)

Unlike the language of IC 6-8.1-10-2.1(d) championed by taxpayer (penalty waiver required if taxpayer’s failure to file “was due to reasonable cause and not due to willful neglect”), the language of IC 6-8.1-10-6(b) offers no “excuse” for similar behavior. Nevertheless, even if the “intent” requirement of IC 6-8.1-10-2.1(d) did apply to penalties imposed pursuant to IC 6-8.1-10-6(b), taxpayers’ protest would still fail because, as the Department previously concluded, *“taxpayer[s] ha[ve] not provided reasonable cause for [their] failure to file.”*

Taxpayers’ argument spotlights the Department’s alleged failure to timely distribute “controlled” pre-printed Form WH-3. (“Controlled” refers to the manner of distribution; only the department may distribute a “controlled” form.) Taxpayers contend that since they failed to “timely receive” their Form WH-3 from the Department, they could not be held accountable for their failure to timely complete and file the required forms (i.e., Form WH-3 along with state copies of Form W-2) with the State. Taxpayers explain:

It is not equitable for the IDR [Department] to benefit from its mistakes by collecting penalties that it caused or could have cured, but for the administrative delay of the Indiana Department of Revenue. Either the IDR failed to mail the Form WH-3 to the taxpayers or the IDR chosen delivery system, the U.S. Mail, did not deliver the form to the Illinois taxpayer. By Affidavit, the owner of the taxpayers avows that the Form WH-3 was never delivered to him. Within the time to timely file the Form WH-3 in question, the Illinois taxpayers requested a replacement Form WH-3. Since the IDR had designated the Form WH-3 a controlled document, it was necessary for the IDR to mail to the taxpayers a replacement form. The unnecessary and unreasonable mail delivery program to out of state taxpayers caused the replacement Form WH-3 to be filed 14 days late. ... Had the taxpayers been allowed to quickly access or easily generate the Forms WH-3 from either a tax forms CD-ROM or via the Internet, these penalties would not have occurred.

Or more concisely: “The taxpayers were willing and able to file the Form WH-3, but were prevented from doing so because no form [WH-3] was delivered to their [taxpayers’] out of state offices.”

According to its records, the Department mailed Form WH-3 to taxpayers on November 18, 2001. In February 2002, taxpayers discovered they had not received their Form WH-3. Taxpayers then contacted the Department “seeking the whereabouts of the original Form WH-3 and requested a replacement form. This telephone call was made in February [2002] before the due date of the Form WH-3....” In response, the Department “mail[ed] a replacement form [Form WH-3] which had been prepared by hand by Department personnel.” Taxpayers assert that it was this delay by the Department that “caused” them to miss the filing deadlines.

Taxpayers are mistaken. The “cause” of taxpayers’ failure to timely file their Information Returns was directly attributable to taxpayers’ failure to recognize, in a timely manner, that their Indiana tax forms (Form WH-3) were “missing.” Taxpayers’ *inability* to marshal their Indiana tax forms in a time, place, and manner sufficient to ensure the forms were timely filed directly “caused” these assessments. And such “inability” represents negligence.

FINDING

Taxpayers’ protests are denied.